PUNITHAMBIGAI PONIAH

v.

KARUNAIRAJAH RASIAH & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[DIVORCE PETITION NO: 33-290-94]
15 OCTOBER 1999

FAMILY LAW: *Financial obligation - Maintenance payments - Payments ceased after child attained 18 years of age - Whether payments should continue until child completes tertiary education - Involuntary financial dependence - Whether a physical disability under s. 95 of Law Reform (Marriage and Divorce) Act 1976 - Whether entitled child to maintenance beyond 18 years of age*

The marriage between the petitioner and the respondent was dissolved. Pursuant to a consent order, the respondent made maintenance payments for the three children of the marriage. The respondent ceased payments for the eldest child when she attained the age of 18. The consent order did not stipulate that the maintenance payments should cease upon the child attaining the age of 18.

In this instance, the petitioner sought to extend the maintenance payments to the eldest child and the other two children until the completion of their degree education. The petitioner alleged that involuntary financial dependence was a physical disability within one of the exceptions to s. 95 which entitled the children to maintenance beyond the age of 18 until their tertiary degree.

Held:

[1] The general principle is that the legal duty of a parent to maintain his or her child ceases when the child attains the age of 18. However, s. 95 creates an exception in that maintenance does not cease at the age of 18 but continues until a physical disability of the child ceases.

[2] Section 52 provides that upon dissolution of marriage by consent, the court may, if it thinks fit, provide for the support, care and custody of the children, if any, of the marriage. Section 92 states that except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person.

[2a] The combined effects of ss. 52, 92 and 95 is that a child of the marriage is not to be denied or deprived of maintenance for the purpose of obtaining tertiary education, at least towards obtaining a first degree, even though such education extends beyond the age of 18.

[3] The Court of Appeal in *Ching Seng Woah v. Lim Shook Lin* held that in appropriate cases, involuntary financial dependence was a physical disability under s. 95. As such, it was fair and reasonable for the respondent to maintain his children until they obtain their first degree, *ie*, beyond the age of 18, as their involuntary financial dependence for purposes of pursuing and/or completing their tertiary education was a physical disability that was an exception under s. 95. The fact that the respondent had not given an undertaking to provide for his daughters till their tertiary degree was insignificant as the court could direct him to do so.

[Consent order for maintenance extended accordingly.]

Case(s) referred to:
Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 ***(foll)***
Gisela Rertrud Abe v. Tan Wee Kiat [1986] 2 MLJ 58 HC ***(dist)***
Gisela Rertrud Abe v. Tan Wee Kiat [1986] 2 MLJ 297 SC ***(dist)***
Kulasingam v. Rasammah [1981] 2 MLJ 36 ***(dist)***
Ng Hee Thong v. Public Bank [1995] 1 CLJ 609 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 2, 52, 87, 92, 95

For the petitioner - Anand Ponnudurai (Mahendran Poniah with him); M/s Sri Ram & Co
For the respondents - Balwant Singh Sidhu; M/s Balwant Singh & Co

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Application

This is an application in encl. (35) filed by the petitioner for an order:

> Bahawa Perintah Mahkamah yang Mulia ini bertarikh 30hb Januari 1997 yang memaksa Responden untuk membayar penanggungan untuk anak sulung perkahwinan mereka, Anitha a/p Karunairajah, dilanjutkan sehingga tamatnya pendidikan ijazah Anitha a/p Karunairajah atau sehingga perintah selanjutnya.

[Translation:

That the Order of this Honourable Court dated 30th January 1997 which compels the Respondent to pay maintenance to Anitha a/p Karunairajah, the eldest child of their marriage, be extended until the completion of the degree education of Anitha a/p Karunairajah or until further order thereof.]

Brief Facts

Vide an order of this court dated 30 January 1997, the respondent had consented to several orders being made, including para. (ii) thereof, in the following terms:

Responden dikehendaki membayar kepada Pempetisyen jumlah sebanyak RM4,200 (iaitu RM1400.00 bagi seorang anak) sebagai nafkah bagi ketiga-tiga orang anak hasil dari perkahwinan tersebut berkuatkuasa dari 1.1.97 dan tunggakan sebanyak RM60,000.00 sebagai penyelesaian akhir dan penuh dalam masa 3 bulan dari tarikh ini.

[Translation:

The Respondent is required to pay to the Petitioner a sum of RM4200.00 (*ie*, RM1400 per child) as maintenance for the three children of the marriage with effect from 1.1.97 and arrears amounting to RM60,000,00 by way of full and final settlement within three months from the date hereof'] ("the aforesaid consent order").

Pursuant to the aforesaid consent order, the respondent made maintenance payments for all the three children monthly until April 1998.

However, *vide* letter dated 12 May 1998 the respondent stated that he would cease payment for the eldest child of the marriage namely Anitha a/p Karunairajah ("Anitha") on the ground that she has attained the age of 18 years. It is to be noted that the said consent order does not stipulate that the maintenance payments would cease upon the child attaining the age of 18 years.

The respondent does not deny that he has ceased maintenance payment in respect of Anitha since May 1998.

The petitioner/applicant now seeks an order from this court to compel the respondent to continue making maintenance payments to Anitha, and by necessary implication the other two children, until the completion of their degree education.

Submission By Petitioner's Counsel

Mr. Anand Ponnudurai, learned counsel for the petitioner subscribed to the view that under s. 95 of the Law Reform (Marriage and Divorce) Act 1976 ("s. 95") the maintenance for a child of the marriage does not stop at the age of 18 years but continues until the child has obtained a first degree through tertiary education, because involuntary financial dependence is a physical disability within one of the exceptions to s. 95 and he relied on the decision of the Court of Appeal in *Ching Seng Woah v. Lim Shook Lin* [1997] 1 CLJ 375; [1997] 1 MLJ 109.

Contention For The Respondent

Mr. Balwant Singh Sidhu, respondent's learned counsel argued that the duration of an order for maintenance under s. 95 shall expire on the attainment by the child of the age of 18 years or where the child is under physical or mental disability, whichever is the later.

He then submitted that s. 87 of the same Act provides that a child is a child of the marriage who is under the age of 18 years. It was however conceded by learned counsel for the respondent that an exception arises where a child is under a physical or mental disability.

In saying that a maintenance order for a child cannot be extended beyond the age of 18 years, learned counsel relied on *Kulasingam v. Rasammah* [1981] 2 MLJ 36; *Gisela Rertrud Abe v. Tan Wee Kiat* [1986] 2 MLJ 58 in the High Court and in the Supreme Court sub. nom [1986] 2 MLJ 297. He further contended that the decision of the Court of Appeal in *Ching Seng Woah v. Lim Shook Lim*, *supra*, that involuntary financial dependence is a physical disability under s. 95 is merely *obiter* and does not bind our High Courts and so may be disregarded.

Issue For Determination

The issue for determination by the court in the instant case may be stated as follows:

> Upon a proper construction of the aforesaid consent order and with particular reference to s. 95 of the Law Reform (Marriage and Divorce) Act 1976, does the involuntary financial dependence of a child of the marriage for the purposes of pursuing and/or completing tertiary education in order to obtain a first degree come within the exception of physical disability under s. 95 so as to entitle the child to maintenance beyond the age of 18 years?.

Decision Of The Court

The decision of this court centres comprehensively on the interpretation of s. 95 which, where relevant, reads as follows:

> **Duration of orders for custody and maintenance**
>
> 95. Except where an order for ... maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, on the ceasing of such disability, whichever is the later.

In order to arrive at a proper interpretation of s. 95, it is necessary for me to consider and analyse the authorities relied on by learned counsel for the respondent to ascertain if any of these authorities is of any assistance to the respondent or to determine if any support may be derived from these cases so as to strengthen the contention advanced for the respondent.

In *Kulasingam v. Rasammah* [1981] 2 MLJ 36, on which learned counsel for the respondent relied, Hashim Yeop Sani J (later CJ Malaya) had the occasion to consider the position of a child where an application is made under the Married Women and Children (Maintenance) Ordinance 1950. Before his Lordship, (at p. 37G rt.) the issue was whether a claimant aged 20 years can be considered a "child". The court referred to the Age of Majority Act 1971, which provides that the age of majority is 18 years, and held that that provision should apply so that maintenance cannot extend beyond the age of 18 years.

His Lordship observed that the legislative thinking on this point would seem to be reflected in the Law Reform (Marriage and Divorce) Act 1976 where the term "child" is defined to mean a person under the age of 18 years: Section 87 and s. 2.

After a careful study of the judgment of the court in *Kulasingam*, *supra*, it is clear to me that the focus is on the definition of a child and the age of minority and the attainment of the age of majority, *ie*, the age of eighteen years, under the Married Women and Children (Maintenance) Ordinance 1950 exclusively. Although references had been made to other legislations, in particular ss. 2 and 87 of the Law Reform (Marriage and Divorce) Act 1976, there was no reference whatsoever to s. 95. The court did not have the occasion to engage itself in the interpretation which is to be given to the provisions of s. 95 or any provision in the 1950 Ordinance which is in *pari materia* with s. 95. A careful and proper reading of the judgment reveals that for the purposes of providing maintenance under the 1950 Ordinance, the court

held that maintenance could not be extended beyond the age of 18 years. Since the court did not have the occasion to decide on the implications of s. 95 or any provision in the 1950 Ordinance which is in *pari materia* with s. 95, 1 am of the view that *Kulasingam*, *supra*, renders no assistance to the respondent, as it is not an authority on s. 95, which calls for determination in the instant case.

The respondent also relied on the High Court decision in *Gisela Rertrud Abe v. Tan Wee Kiat* [1986] 2 MLJ 58 where at p. 60H rt. Siti Norma Yaakob, J (now JCA) said:

> This brings me to consider the position of the two children of the marriage and their entitlement to be maintained by their father, the Respondent. The Petitioner feels very strongly that she is duty bound to provide them with the best education which they are now receiving in England and she maintains that the respondent is morally bound to maintain them whilst they are there. The elder of the two girls is now 22 and the younger will be 18 next month. Under Section 95 of the Law Reform (Marriage and Divorce) Act 1976, the duration of a maintenance order made in favour of a child expires, in the absence of any expressed shorter period, on the child attaining the age of 18 years. Reading this Section, it is clear that this is a mandatory provision and that being the case, 1 consider that consideration of moral grounds is of no relevance whatsoever. To that end then the Respondent's legal responsibility to maintain the elder of the two children ended when she became 18 on December 8, 1980 and that of the younger daughter will end on May 31, 1985, when she too celebrates her eighteenth birthday.

That decision was upheld on appeal in *Gisela Rertrud Abe v. Tan Wee Kiat* [1986] 2 MLJ 297 by the Supreme Court, which said at p. 300B that when the elder daughter, Tan Kay-ti reached her eighteenth birthday on 8 December 1980, she ceased to be entitled to support from her father; and at line C that when the second daughter, Tan Su-Lin attained the age of eighteen years on 31 May 1985, maintenance would also cease, in view of the implicit provision of s. 95 of the Act.

In my view, the general principle which may be culled from the respective judgment of both the High Court and the Supreme Court is that the legal duty of a parent to maintain his or her child ceases when the child attains the age of 18 years. However, a careful reading of both the judgments makes it obvious to me that no views had ever been ventilated by the respective learned counsel therein relating to the application of the exceptions pertaining to e.g. the physical disability brought about by a child's involuntary financial dependence for the purposes of pursuing and/or completing tertiary education in order to obtain a first degree, in which case, s. 95 creates an exception in

that maintenance does not cease at the age of 18 years but would continue until the physical disability ceases. Hence this exception would entitle the child to maintenance beyond the age of eighteen years. In the circumstances, it is my view that both the High Court and the Supreme Court judgments are authorities only for the principle that as a general rule, under s. 95, the maintenance of a child shall cease upon a child of the marriage attaining the age of eighteen years. Both the High Court and the Supreme Court did not have the opportunity to hear submissions or decide on the question as to what constitutes physical disability under s. 95, which is the issue for determination by this court in the instant case. That being the case, I have no doubt whatsoever that these two authorities are also of no assistance to the contention raised by learned counsel for the respondent.

I shall now consider the Court of Appeal decision in *Ching Seng Woah, supra.* In that case, after hearing a divorce petition the trial judge directed, amongst others, that the husband was to pay RM1,000 per month for their daughters, their medical bills and their education up to tertiary first degree. The husband appealed against the above order wherein the husband's counsel submitted in the appeal that the trial judge should not have ordered any maintenance at all to the two daughters beyond their 18th birthday.

Learned counsel for the respondent herein, Mr. Balwant Singh Sidhu, who was also the learned counsel on record for the appellant husband in *Ching Seng Woah supra*, had in that case, as in this case, relied on s. 95 and submitted that maintenance payment must expire on the attainment by the child of the age of 18 years.

The Court of Appeal unanimously rejected Mr. Balwant Singh Sidhu's submission and held that the maintenance should extend to a child's tertiary degree, beyond the age of 18 years. The relevant judgment which is directly on the point raised in the instant case before me, *ie*, on the issue of maintenance beyond the age of 18 years, was delivered by Mahadev Shankar JCA for the Court of Appeal. After referring to s. 95, at p. 120 his Lordship recited learned counsel's contention that unless the exceptions apply, all orders for maintenance shall expire on the attainment by the child of the age of 18 years. In this connection, his Lordship set out the relevant judgment of the Court of Appeal in these words:

> When parents divorce, the children suffer the most. If Mr. Sidhu is right, every able bodied child of 18 can be turfed out into the streets with impunity! Not only can they not look to their parents thereafter for money but also by inference for shelter in the matrimonial home! Section 95 could thus become the **bohsia's** charter.

> In the narrow context of this case, this submission is somewhat startling because it comes from a husband who in the court below undertook on oath and with the benefit of legal advice to maintain his daughters till they received their first degree, *ie*, till they were educationally equipped to find their rightful place on the job market. It is a fundamental doctrine of law that a person cannot be permitted to reprobate what he has approbated. We therefore reject this submission.
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> As to its wider implications, our view is that the powers provided for the protection of children by Pt VIII of our Act are additional to and not restrictive of the powers contained in Pts VI and VII. Part VIII, Section 95 in particular, has to be viewed in the context of a child who is not simultaneously faced with the break-up of the family homestead. The parental duties in this context are spelt out by Section 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.
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> ... the issue is whether the court can direct the husband to provide for his daughters till their tertiary degree, even if he had not undertaken to do so. The court's powers under Section 52 are very wide and transcend the limitations contained in Section 95, because Section 52 operates in a situation where the family is being legally disintegrated.

Section 52 provides, *inter alia*, that upon a dissolution of marriage by consent, the court may, if it thinks fit, provide for the support, care and custody of the children, if any, of the marriage.

Section 92 states that, except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food, education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

In my view, the combined effect of ss. 95, 52 and 92 is that a child of the marriage is not to be denied or deprived of maintenance for the purpose of realising the opportunity, right or access to education including tertiary education even though such education, at least towards obtaining a first degree, extends beyond the age of 18 years.

In this regard it is pertinent to note the averments of the petitioner in paras 7 and 9 of her affidavit affirmed on 17 November 1998 as follows:

> **Para. 7** It is no fault of Anitha's that the family has been legally disintegrated and the Respondent must bear responsibility for the involuntary financial dependence that Anitha is now exposed to.

> **Para. 9** Having regards to the respondent's means and station in life, he is capable financially of seeing Anitha through her tertiary education. I am therefore advised by my solicitors and I verily believe that the Respondent is obliged to maintain Anitha, who is his daughter and maintenance in this context extends to accommodation, clothing, food and education.

The respondent has not denied any of the above averments and hence it is deemed admitted: *Ng Hee Thong v. Public Bank* [1995] 1 CLJ 609; [1995] 1 MLJ 281 CA.

Furthermore, Mr. Balwant Singh Sidhu, learned counsel for the respondent herein and also in *Ching Seng Woah, supra,* did not canvas on what the words 'physical or mental disability' in s. 95 meant.

In this connection, *Mahadev Shankar,* JCA at p. 120 of the judgment in *Ching Seng Woah, supra*, observes where relevant as follows:

> A 19 year old computer whiz-kid who is a wheel chair case and therefore well able to earn a living at that age could here be contrasted with another 18 year old who is physically and mentally fit but otherwise totally unable to fend for himself on the job market. ... However, we must take note that, unlike the United Kingdom and many other European countries, Malaysia is not a welfare state. Whilst married women's claim to a share of the matrimonial assets is now entrenched in our laws, the rights of the dependent young persons in these assets is yet to receive proper articulation. ... we are inclined to the view that in appropriate cases, involuntary financial dependence is a physical disability under Section 95 of the Act.

It is crystal clear that the decision of the Court of Appeal focusses specifically on the interpretation of the phrase "physical disability" which is directly and pertinently on the same issue before me. In the circumstances, I hold that this is the case in which I am bound to follow the decision of the Court of Appeal, pertaining to the continuance of maintenance in favour of a child of the marriage under a physical disability pursuant to s. 95, by reason of a child's involuntary financial dependence for the purpose of pursuing and/or completing tertiary education in order to obtain a first degree.

Although it is true that in *Ching Seng Woah*, the husband had undertaken to maintain the children of the marriage till they receive their first degree, while the respondent in the instant case has not given any such undertaking, in my view, the difference is insignificant as it has been clearly elucidated by the Court of Appeal in *Ching Seng Woah,* at para. H of p. 120 that the court can direct the husband to provide for his daughters till their tertiary degree, even if he had not undertaken to do so.

After a very careful analysis and exposition of all the aforesaid relevant provisions of the Law Reform (Marriage and Divorce) Act 1976, I am of the view that it is fair and reasonable for respondent to maintain his children until they obtain their first degree *ie*, beyond the age of 18 years, as their involuntary financial dependence for purposes of pursuing and/or completing their tertiary education constitutes a physical disability as an exception under s. 95.

By reason of the above, I hold that the answer to the issue for determination in the instant case is in the affirmative and I hereby order that the said consent order for the maintenance of the three children of the marriage at a total sum of RM4,200 (*ie*, at RM1,400 per child) be extended beyond the age of 18 years in the event that Anitha and/or other children of the marriage do gain a place in any public or private educational institution of higher learning in order to obtain their first degree respectively.

In view of the immense importance and implications of my decision in this case, in the interest of justice, I implore learned counsel for the respondent to seriously consider an appeal against my decision so that this decision can stand the scrutiny of the more authoritative decision of the Court of Appeal and eventually the Federal Court which would most certainly be of enormous value and practical purpose to other litigants who may be similarly circumstanced. This is especially significant since there is a growing need or indeed a consistent demand by our able and promising young people for tertiary education as we are now moving towards an increasingly educated nation in the new millennium.